

Decision 02-01-042

January 9, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Consider Modifications to the Universal Lifeline Telephone Service Program and General Order 153.

Rulemaking 98-09-005

ORDER DENYING REHEARING OF DECISION 01-08-060**I. SUMMARY**

In Decision 96-10-066, the Commission revised General Order 153 to authorize each Local Exchange Carrier ("LEC") to recover from the Universal Lifeline Telephone Service Fund ("ULTS Fund") its "lost revenues" from providing subsidized service -- that is, the difference between its tariffed rates for basic service and the discounted rate charged eligible customers. Decision 00-10-028 further revised General Order 153 to limit such reimbursement for an LEC to that recoverable by the applicable Incumbent Local Exchange Carrier ("ILEC"). FONES4ALL then filed an application for rehearing of Decision 00-10-028, which was denied by Decision 01-01-022.

Next, FONES4ALL filed a petition for modification of Decision 00-10-028, together with a motion for a partial stay. In turn, Decision 01-08-060 granted FONES4ALL a stay of Decision 00-10-028 on condition that it obtain a surety bond in the amount of lost revenues exceeding the maximum allowed by Decision 00-10-028 that it would recover from the ULTS Fund while its petition for modification is under review. Most recently, FONES4ALL filed an application for rehearing of Decision 01-08-060, arguing among other things that the condition of a surety bond is arbitrary and capricious. As discussed below, consistent with the Commission's broad discretion under Rule 47,

Decision 01-08-060 protects the ULTS Fund from excess payment of lost revenues if FONES4ALL's petition for modification is denied, while ensuring that FONES4ALL would be made whole if its petition is granted.

II. BACKGROUND

On November 7, 1984, the Commission issued Decision 84-11-028, adopting General Order 153, to implement the Moore Universal Telephone Act of 1983. The stated purpose was "to provide a class of local telephone service designed to meet minimum residential communications needs of customers who are eligible under this General Order through subsidized telephone service funded by a limited tax on suppliers of intrastate interLATA telecommunications service." Appendix A, Section 1.1.1. Toward this end, Decision 96-10-066 authorized LECs to recover from the ULTS Fund their lost revenues from providing this service. Appendix B, Section 5.A.c. Over the years, operation of this program was significantly revised, although without corresponding change to General Order 153.

On September 3, 1998, the Commission issued an order instituting Rulemaking 98-09-005. As the Commission explained, "A confluence of circumstances has created a need to consider significant modifications to ULTS program and GO 153." Mimeo at 2. First, "GO 153 has become outdated and of marginal use in administering the ULTS program." Id. Also, "[T]here are no uniform standards governing compliance with key aspects of the ULTS program." Id. at 4. Specifically, the Commission proposed to "revisit the policy regarding carriers' recovery of lost revenues for non-recurring service charges and recurring rates from the ULTS fund." Appendix B, Section IV.

On October 5, 2000, the Commission issued Decision 00-10-028, adopting various revisions to General Order 153. In particular, the Commission concluded that a limit should be placed on the amount of lost revenue recoverable from the ULTS Fund to prevent utilities from reaping unreasonably high profits:

For example, an unscrupulous utility could establish a tariffed service connection of \$500, charge a ULTS customer the

discounted ULTS connection charge of \$10, and recover from the ULTS Fund an amount of lost revenue equal to the difference between \$10 and \$500, or \$490.

Mimeo at 87. The Commission also noted that “it is unlikely that our capping the recovery of lost revenues will cause any [competitive local carrier (“CLC”)] to lose money on the provision of ULTS . . . because CLCs, if they chose to do so, may provide ULTS by reselling [basic service] offered by the ILEC.” *Id.* at 88. Furthermore, the Commission disagreed that competitive neutrality requires that the ULTS Fund continue to reimburse CLCs for the difference between their tariffed rates for basic service and the discounted rates for subsidized service: “Our decision to cap the recovery of loss revenues conforms to the principle of competitive neutrality since it effectively requires the ULTS program to pay no more for ULTS than the lowest price that is commonly available for this service.” *Id.* at 89-90. Accordingly, General Order 153 was revised to cap “the recovery of lost revenues to the lower of (1) the lost revenues claimed by the utility actually serving the ULTS customer, or (2) the lost revenues that the customer’s ILEC would claim if the ILEC were providing ULTS.” *Id.* at 90, footnote 179.

On November 16, 2000, FONES4ALL filed a petition for leave to intervene in Rulemaking 98-09-005, indicating that it “holds authority pursuant to Decision No. 00-05-018 to provide resold exchange telecommunications services as a [CLC] in the service territories of Pacific Bell and Verizon California, Inc. . . .” Petition at 1-2.

Simultaneously, it filed an application for rehearing of Decision 00-10-028, arguing that limiting reimbursement from the ULTS Fund to the level recoverable by ILECs (1) is arbitrary and capricious, (2) violates the requirement of competitive neutrality, and (3) denies CLCs the right to earn a fair return on their investment. On January 4, 2001, the Commission issued Decision 01-01-022, denying the petition of FONES4ALL, since it had waited too long to intervene, and thus its application for rehearing because it was not a party.

On March 14, 2001, FONES4ALL filed a petition to modify Decision 00-10-028. By its proposed modification, “[A]ll but the largest carriers would receive

reimbursement . . . in an amount equal to the difference between their recurring monthly ULTS rates and a set schedule of presumptively-reasonable rates applicable to all carriers.” Petition at 5. According to FONES4ALL, this approach would “promote the availability of competitive choice and enhance service quality for low-income subscribers while eliminating the inefficiency, unfairness, and anti-competitiveness now inherent in the adopted rules.” Id. at 2. Along with this petition, FONES4ALL filed a motion for partial stay of Decision 00-10-028, pending the Commission’s consideration of its petition for modification.

On August 23, 2001, the Commission issued Decision 01-08-060, granting the motion of FONES4ALL for a partial stay of Decision 00-01-028. The Commission explained, “FONES4ALL has shown good cause to stay the provisions of D.00-10-028 that limit the recovery of lost revenues pending our consideration of FONES4ALL’s petition to modify these provisions.” Mimeo at 3. In addition, the Commission directed that, if its petition to modify D.00-10-028 is ultimately denied, “FONES4ALL shall reimburse the ULTS Fund for the amount of lost revenues it recovers from the ULTS Fund in excess of that allowed by D.00-10-028, plus interest based on the three-month commercial paper rate published in Federal Reserve Statistical Release G-13 (‘3-month Commercial paper rate’).” Id. at 9. To ensure reimbursement, the Commission directed FONES4ALL to obtain a surety bond containing the following terms and conditions:

- A statement that the purpose of the surety bond is to guarantee payment to the ULTS Fund in the event that FONES4ALL’s petition is denied in whole or part.
- The amount of the bond equals the lost revenues that FONES4ALL recovers from the ULTS Fund in excess of that allowed by the D.00-10-028, plus interest based on the 3-month commercial paper rate.
- The ULTS Fund is named as the obligee.
- The bond shall remain in effect until (1) FONES4ALL’s petition to modify D.00-10-028 is

granted, or (2) FONES4ALL reimburses the ULTS Fund as described previously.

- The surety and principal can cancel the surety bond only after filing notice at the Commission's Docket Office, and serving the same notice on the assigned Administrative Law Judge, the assigned Commissioner, and the Director of the Commission's Telecommunications Division. The notice must be filed and served at least 90 days in advance of the cancellation.
- The surety is licensed by the California Department of Insurance to provide the bond.

Id. at 4-5. In ordering these terms and conditions, the Commission expressly rejected FONES4ALL's alternative proposal (1) to limit to 5,000 the number of customers for which FONES4ALL may recover lost revenues and (2) to deposit \$25,000 per month into an escrow account pending the Commission's resolution of FONES4ALL's petition to modify D.00-10-028. Id. at 6.

On September 21, 2001, FONES4ALL filed an application for rehearing of Decision 01-08-060. First, in its view, the condition of a surety bond is arbitrary and capricious:

Although Decision No. 01-08-060 concludes that there is good cause to grant FONES4ALL's request for a partial interim stay Decision No. 00-10-028, the bond requirement effectively eliminates any benefit or purpose in adopting the stay because no surety would ever permit a carrier in FONES4ALL's position to use the secured funds to pay its costs of providing service or for any other purpose whatsoever.

Application at 1. Additionally, the limitation imposed by Decision 01-08-060 on the recovery of lost revenues violates the requirement of competitive neutrality and is thus "every bit as unlawful under 47 U.S.C. § 253(b) as General Order No. 153 itself." Id. at 8. And finally, by depriving FONES4ALL an opportunity to earn a fair return, "[T]he limited recovery mechanism of General Order No. 153 . . . results in a confiscation of

property in violation of FONES4ALL's rights under the Fourteenth Amendment." Id. at 9.

III. DISCUSSION

"The Commission has broad discretion when considering a petition to modify a previous decision." Re MCI Telecommunications, Decision 98-10-032, mimeo, at 2. Under Rule 47(h),

[T]he Commission may modify the decision as requested, modify the affected portion of the decision in some way consistent with the requested modification, set the matter for future hearing or briefing, summarily deny the petition on the ground that the Commission is not persuaded to modify the decision, or take other appropriate action.

Here, the Commission quite properly exercised that discretion during the pendency of its review of FONES4ALL's petition to modify Decision 00-10-028:

The reason we are requiring FONES4ALL to obtain a surety bond is to protect the ULTS Fund from a financial loss in the event that FONES4ALL's petition is denied and FONES4ALL is unable to repay the ULTS Fund for previous draws of "excess" lost revenues. FONES4ALL's proposal does not meet this objective. In particular, FONES4ALL's proposal to limit its recovery of lost revenues of 5,000 ULTS customers does not protect the ULTS Fund, since FONES4ALL has fewer than 5,000 ULTS customers. Similarly, FONES4ALL's proposal to deposit \$25,000 per month into an escrow account does not fully protect the ULTS Fund, since FONES4ALL draws more than \$25,000 per month in "excess" lost revenues.

Decision 01-08-060, mimeo, at 6-7. Correspondingly, the partial stay insures that FONES4ALL would recover the amount of lost revenues in excess of that allowed by Decision 00-10-028 if its petition for modification is granted. Moreover, in Decision 01-08-060, the Commission did not rule whether it would likely grant the petition for modification nor whether FONES4ALL would otherwise suffer irreparable harm. Rather, the Commission simply exercised its discretion under Rule 47 to grant a conditional stay of Decision 00-12-028. Similarly, the additional arguments made by

FONES4ALL regarding competitive neutrality and recovery of cost were considered and rejected by the Commission in Decision 00-10-028. See mimeo at 88 to 89. And because it is now final, that decision is conclusive and cannot be made the subject of collateral review. See Section 1709 of the Public Utilities Code.

IV. CONCLUSION

FONES4ALL 's application for rehearing of Decision 01-08-060 should be denied.

THEREFORE, IT IS ORDERED that rehearing of Decision 01-08-060 is denied.

This order is effective today.

Dated January 9, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners